STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commission Members and Counsel

From: Paul Lavin

Date: December 7, 2006

Re: Statutory Changes for Your Consideration at the December 12th Meeting

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The Ethics Commission is specifically authorized to introduce legislation relating to areas within its jurisdiction. The attached proposal is the second of two rounds of statutory changes which you may wish to consider for submission to the Legislature. At the Commission meeting on November 20th, you considered the first round of proposed changes. The staff memo regarding those initial changes is attached. Due to the comments of the Commission members and interested parties, the staff made further changes to the initial proposal. Those changes are explained in this memo. Any proposed changes from the first round which were not changed in the second round are highlighted. There are some changes in the statutes that are not discussed in this memo. Those changes mostly comprise of word and structure changes and do not consist of any substantive changes.

## Proposed Changes to Chapter 13 of Title 21-A

### 21-A M.R.S.A. §1002 – Meetings of commission

The proposed change eliminates the requirement that the Commission's office remain open until 8:00 p.m. on election nights. The Commission staff has not experienced any demand for assistance from the staff during that time period.

### Exclusions to the definitions of contribution and expenditures
### 21-A M.R.S.A. §§1012(2)(B)(4-A) and (3)(B)(5-A)

This exclusion currently refers to the unreimbursed travel expenses incurred and paid by the candidate or the candidate's spouse. The change specifies that the expenses be campaign-related, adds unreimbursed lodging expenses, and adds reimbursements to the candidate's domestic partner.

### 21-A M.R.S.A. §§1012(2)(B)(7) and (3)(B)(10)

This exclusion refers to compensation paid by a party committee to an employee who provides advice to a candidate for no more than 20 hours in an election. Earlier this year, the Commission issued an advisory opinion in response to a request by the two major

parties regarding this exclusion. A plain reading of the current law is that the party committee can pay for a staff person to work for 20 hours per candidate per election without the compensation being considered a contribution or expenditure on behalf of the candidate. The kind of work the party employee can provide is limited to providing "advice," which the Commission interpreted narrowly as counseling a candidate about what actions to take regarding his or her campaign.

The staff recommends limiting the amount of compensation that would be excluded from the definitions of contribution and expenditure to 20 hours per party employee (rather than per candidate) per election. The staff also recommends changing the word "advice" to "assistance." This change would allow party committees to provide a range of services to candidates, including advice, depending on the needs of the candidate.

**21-A M.R.S.A. §1012(5) – Party candidate listing**
During the election, the Commission staff fielded several questions from party committees about including federal candidates in a party candidate listing or using specific content that may fall outside the limits of the law. The staff proposes changing the party candidate listing requirements specifically to allow the inclusion of Maine candidates for federal office as long as federal laws and regulations were not violated by doing so. In addition, the staff proposes including the use of campaign slogans and campaign or party committee logos in the list of acceptable content for party candidate listings.

**21-A M.R.S.A. §1013-A(1)(C) – Statement regarding voluntary spending limits**
Under the current law, candidates seeking MCEA certification are required to sign the Statement of Voluntary Spending Limits as are privately-financed candidates. However, instead of agreeing to voluntary spending limits, the MCEA candidate is merely stating that he or she has filed a declaration of intent to become an MCEA candidate and will be bound by the Act's spending limits. To obtain MCEA certification, a candidate must agree to limit his or her campaign spending to the amount of public funds made available to the candidate. The staff does not believe that any purpose is served in also requiring MCEA candidates to sign and file another statement other than the Declaration of Intent. However, the staff will propose to the Commission a change in the rule regarding the Declaration of Intent to provide more emphasis to the spending limitations to which an MCEA candidate must agree.

**21-A M.R.S.A. §1014 – Publication or distribution of political statements**
At the November meeting, the staff presented the following proposed changes to the requirements regarding the "paid for" disclosure statement:

1. Eliminating the requirement for a disclosure statement on radio ads paid for by the candidate or the candidate's committee;
2. Extending the time period to which the disclosure statement requirement applied from 21 to 60 days prior to an election and creating an exemption for communications not intended to influence the election or defeat of a candidate; and

3. Limiting the time period to which the disclosure statement requirement applied to automated phone calls to 60 days before an election and adding a requirement that scripted live phone calls also contain the disclosure statement. Voter identification research would be exempt.

The staff proposes these additional changes:

1. Eliminating the disclosure requirement for television advertisements paid for by the candidate or the candidate's committee.
2. Establishing a time period of 30 days prior to the primary election and 60 days before a general election to which the disclosure statement requirement would apply to all communications that name or depict a clearly-identified candidate, including automated or live telephone calls, except those communications specifically exempted. These time periods mirror the proposed time periods regarding independent expenditures.
3. Extending the prohibition against broadcasting a communication without the disclosure to newspapers omitting the disclosure on political advertisements appearing on online versions of the newspaper and including agents of a person operating a broadcast station among those subject to the prohibition.
4. Changing the time period for determining a fine if there is a violation of the disclosure requirement from 10 days to 30 days before an election. Currently, if a communication made more than 10 days before an election does not have the disclosure statement, the person who financed the communication has 10 days to correct the deficiency or be fined up to $100. If the communication is made within 10 days of the election, the person who financed the communication could be fined up to $200. The staff believes that the time period is too close to the election to be an effective deterrent against violations of this requirement. The change also proposes a requirement that the person who financed the communication or committed the violation within 30 days of an election to correct the violation within 10 days of being notified by the Commission.
5. Requiring prerecorded an automated or live telephone call to include the disclosure of the name of the candidate in whose support the call is made.

**21-A M.R.S.A. §1015 – Limitations on contributions and expenditures**

The staff proposes extending the exemption from contribution limits to a candidate's domestic partner. The enumeration of entities other than individuals to which the contribution limits apply is changed to include all the entities listed in the definition of "person" in §1001(3). This does not broaden the reach of the limitation but removes possible confusion as to which entities the contribution limit applies.

The proposed change to §1015(4) seeks to clarify that the prohibition against earmarked contributions in this subsection applies only to contributions which are made directly or indirectly to an intermediary or conduit and which are specifically earmarked by the contributor to be contributed by that intermediary or conduit to a candidate. The statute currently reads as though earmarked contributions are only one of other types of

contributions covered under this prohibition. However, the apparent intent of the statute is only to prohibit earmarked contributions that are transferred to a candidate by a conduit. This issue came before the Commission in the request for an advisory opinion by the two major parties and when the issue was raised by the "Maine for Mills" PAC. This change is consistent with the Commission's advisory opinion to the parties.

**21-A M.R.S.A. §1017 – Reports by candidates**

**Six-Day Pre-Election Report.** The staff proposes changing the filing deadline and reporting period for the last report filed prior to an election. Currently, the report is due 6 days before the election and must be complete as of the 12th day before an election. The change would require that the report be filed by the 11th day before an election and be complete as of the 14th day before and election. The major advantages of this change are that 1) candidates will know sooner that the sixth day before an election what the other candidates in the election have raised and spent, 2) the Commission staff will have more complete information upon which to base the calculation of matching funds, and 3) candidates will not have to deal with the filing of a report in the last week of campaigning. One possible downside to the change is that candidates and their treasurers will only have three days from the end of the reporting period to complete and file the report.

**24-Hour Report.** Currently, there are two different 24-Hour Reports. One type of report applies to all candidates and covers certain contributions and expenditures occurring after the 12th day before an election. The other applies only to certain privately-financed candidates with MCEA opponents and covers certain expenditures occurring after the 14th day before an election. The staff proposes eliminating the second 24-Hour Report and changing the reporting period for the first.

All candidates would be required to file 24-Hour Reports after the 14th day before an election for any contribution aggregating $1,000 or more from a single contributor and any single expenditure of $1,000 or more for gubernatorial candidates, and for any contribution aggregating $500 or more from a single contributor and any single expenditure of $500 or more for legislative candidates.

This proposal has relatively little impact on gubernatorial candidates. More MCEA candidates and privately-financed candidates who do not have an MCEA opponent or who are not required to file accelerated reports may have to file 24-Hour Reports because the relevant amount has dropped from $1,000 to $500 for them. The trigger amount is also slightly lower for privately-financed Senate candidates with MCEA opponents (from $750 to $500). However, the staff is in favor of streamlining the filing requirements for candidates regarding these reports and believes that these changes will result in more useful information for candidates during the last two weeks of the campaign.

**Accelerated reporting schedule.** The staff proposes simplifying the determination of whether privately-financed candidates with MCEA opponents need to file accelerated reports. Currently, these privately-financed candidates are required to file reports when they have raised or spent more than 101% of the amount initially distributed to their

MCEA opponents. The staff proposes changing that triggering amount to the exact amount of the initial distribution. In addition, the proposed change would eliminate the requirement for privately-financed candidates to file affidavits in lieu of accelerated reports if they have not reached the 100% amount. Under this proposed change, privately-financed candidates would only be required to file periodic accelerated reports if they have crossed the threshold amount. The staff also proposes changing the deadline and reporting period for the last accelerated report before an election to the 6th day (instead of the 12th day) before an election and a reporting period covering up to the 8th day (instead of the 14th) before an election. With the recommended change to the regular filing schedule for all candidates, requiring accelerated report filers to file 6 days before the election will allow the staff to determine whether additional amounts of matching funds are due MCEA candidates.

Currently, campaigns with total receipts or expenditures aggregating less than $500 per election do not have to file itemized reports. The staff proposes eliminating this exemption.

The staff also proposes clarifying the requirement that candidates who have a campaign surplus exceeding $50 must dispose of that surplus within 4 years of the election for which the contributions were received according to the statutory guidelines.

**21-A M.R.S.A. §1017-A – Reports of contributions and expenditures by party committees**

The staff proposes a change to the filing schedule for municipal, district and county party committees from a fixed due date of October 27th of an election year to the 6th day before the general election. This is consistent with the filing requirements for state party committees and PACs.

**21-A M.R.S.A. §1019-B – Reports of Independent Expenditures**

In November, the staff proposed for your consideration the extension of the time period during which a communication that mentions a clearly identified candidate would be presumed to be an independent expenditure if there was a MCEA candidate in that race. The original proposal was to extend the "rebuttable presumption" period from 21 days to 60 days prior to an election. In response to the comments made by the Commission and interested parties at the November meeting, the staff proposes changing the time period during which the rebuttable presumption under §1019-B(1)(B) applies from the current 21 days before an election to 30 days prior to a primary election and 60 days prior to a general election. This change takes into account the possibility that the legislature may still be in session if the primary period was 60 days.

The staff also proposes that the independent expenditure report contain a description of the communication subject to the expenditure.

**21-A M.R.S.A. §1020-A – Failure to file on time**

The staff proposes changing the amount of a penalty that may be waived from under $5.00 to under $10.00.

**21-A M.R.S.A. §1055 – Publication or distribution of political statements (for PACs)**
The staff proposes eliminating the separate section on the "paid for" disclosure requirement for PACs, because §1014 already is applicable to PACs.

**Proposed Changes to the Maine Clean Election Act**

**21-A M.R.S.A §1122(3-A) – Definition of immediate family**
A proposed change in §1125(6) (restrictions on MCEA expenditures) requires that the Act contain a definition of "immediate family." The definition incorporates the definition contained in 21-A M.R.S.A. §1(20) which covers members of the candidate's and the candidate spouse's immediate family. The proposed definition expands it to include the candidate's domestic partner and members of the candidate's domestic partner's immediate family.

**21-A M.R.S.A. §1122(7) – Qualifying Contribution**
The staff is proposing several changes to the definition of "qualifying contribution" to strengthen two key components underlying the concept and purpose of qualifying contributions. The first is to put more emphasis on the principle that qualifying contributions must be made in support of a candidate, which was the original intent of the Act regarding qualifying contributions. There is a word change in subsection (7)(A) to draw more attention to this requirement.

Under the current law, there is a requirement that the qualifying contributions be "acknowledged by a written receipt that identifies the name and address of the donor on forms provided by the commission." To implement this requirement, the Commission's "Qualifying Contribution Receipt and Acknowledge Form" requires the candidate to acknowledge receiving the contribution and the contributor to acknowledge that he or she made the contribution with his or her own funds for which they received nothing in exchange. The staff thinks that the statute should have clearer and stronger requirements regarding the contributor's and the candidate's acknowledgements. The proposed change would require the contributor to acknowledge three things – that the contribution was made with his or her own funds, that it was made in support of the candidate, and that he or she received nothing of value in exchange for the contribution. The candidate would have to acknowledge that the contribution was obtained with his or her knowledge and approval and that nothing of value was given in exchange for the contribution.

Another change explicitly addresses the issue that qualifying contributions will only count toward a candidate's required amount if the contributor is a registered voter in the electoral district in which the candidate is running at the time the contribution was made and if the municipal registrar has verified the contributor's voter registration prior to the applicable deadline for final submittal to the Commission. In the case of one candidate in the last election who ultimately did not qualify for MCEA funding, an argument was raised that as long as the contributor was registered at the time the contribution was made, it did not matter if the voter registration was verified prior to the applicable deadline for submitting qualifying contributions. The practice and intent has always been

that the registration had to be verified prior to the deadline. The staff makes this proposal to remove any doubt that the contributor's voter registration must be verified at least by the applicable deadline for the candidate.

**21-A M.R.S.A. §1122(9) – Seed Money Contribution**

The Commission staff proposes a requirement that only Maine residents can make seed money contributions. Even though collecting seed money is not a requirement under current law (see the proposed change under §1125(5) regarding a seed money minimum requirement for gubernatorial candidates), it is an indicator of basic support for a candidate, especially in a gubernatorial race, which requires a statewide effort to collect qualifying contributions. In 2006, two gubernatorial candidates seeking public funds collected very large amounts of out-of-state seed money contributions (67% and 47%); other gubernatorial candidates only collected between 5% and 10% from individuals outside Maine. With so much public funding at stake for gubernatorial candidates, the staff believes that it is sensible that seed money contributions be restricted to only Maine residents. Also, this change will assist the staff in verifying compliance with the requirement that seed money actually be contributed with the personal funds of the contributor.

The staff also does not believe that this proposed change will have a burdensome effect on legislative candidates. Most legislative candidates already raise nearly all of their seed money contributions from Maine residents. In addition, the maximum that they can raise ($1,500 for Senate candidates and $500 for House candidates) is considerable less than the maximum for gubernatorial candidates ($50,000).

The proposed change also removes the description of seed money restrictions from the definitional section and moves it to the section on terms of participation.

**21-A M.R.S.A. §1124(2) – Sources of funding**

In 2003, the law was amended to allow the Commission three opportunities to request an advance of the General Fund transfers in 2005, 2007, and 2008. This was a self-expiring provision after the last opportunity to request such a transfer on July 31, 2006. The staff proposes eliminating these expired provisions from the Act.

As a part of this section, the Commission is required to report to the legislative and executive branches by January 1st if the Commission determines that there will not be sufficient funds for the upcoming calendar year. This section also requires the Commission to publish, by September 1st preceding an election year, an estimate of the funds available for the next election and the likely demand for them (21-A M.R.S.A. §1124(3)). The staff proposes removing the current text of §1124(3) and replacing it with the text from §1124(2). This will require the Commission to report to the legislative and the executive branches by January 1st, if it determines that there will not be sufficient funds for an upcoming election.

One of the sources of funding in the Act is the transfer of a candidate's unspent seed money contributions remaining after certification. In practice, instead of requiring the

candidates to actually transfer unspent seed money contributions to the Fund, the Commission has reduced the amount of a candidate's initial primary distribution by the amount of unspent seed money. This has the same effect as the candidate transferring the funds to the Commission. The staff proposes eliminating that provision from §1124(2) and instead codifying the practice of using the unspent seed money as an offset against the initial primary distribution in §1125(8).

**21-A M.R.S.A. §1125(2-A) – Seed money report**

The requirement to report seed money contributions and expenditures is moved to a new subsection (2-A). The proposed change also requires that a candidate report the name, residential address, occupation, and employee for every seed money contributor. The staff also proposes that the Commission have the discretion to require gubernatorial candidates to obtain the seed money contributor's signature on a contribution card, attesting that the seed money contribution was made with the contributor's personal funds and was not reimbursed by any other source. The staff proposes this change as another means by which to ensure and verify compliance with MCEA requirements by gubernatorial candidates when large amounts of public funds could be disbursed.

**21-A M.R.S.A. §1125(2-B) – Seed money restrictions**

The staff also proposes adding a new subsection (2-B) for seed money restrictions, which will contain all of the seed money restrictions now contained in the definition of seed money in §1122(9) currently. The new subsection includes an express prohibition against using MCEA funds received after certification to pay for any goods or services received prior certification. It specifically states that goods and services received prior to certification can only be paid for with seed money contributions and that a candidate cannot raise or spend seed money after certification.

**21-A M.R.S.A. §1125(3) – Qualifying contributions**

The staff proposes making two significant changes to the requirements for a gubernatorial candidate to be eligible for public funds. The first is raising the minimum number of qualifying contributions for a gubernatorial candidate from 2,500 to 3,000. A number of observers have commented that the Legislature should consider raising the minimum for gubernatorial candidates. The Commission staff have met with and received comments from members of the political parties, public interest groups, and others. There was nearly unanimous support for raising the minimum to 3,000. The second is a requirement that gubernatorial candidates get at least 50 qualifying contributions from verified registered voters in each of Maine's sixteen counties. Given the large amounts of public funds at issue, it is reasonable to require gubernatorial candidates to be able to demonstrate widespread support throughout the state. The staff also proposes another requirement for gubernatorial candidates – a minimum amount of seed money raised – which will be discussed below.

Under current law, there is no requirement that contributors sign money orders when they are used for qualifying contributions. The staff recommends to candidates that they have contributors sign money orders. Many do, but there is still the potential for abuse. The Commission has seen two high-profile cases in which money orders may have been used

fraudulently. The staff proposes that money orders must be signed by the contributor in order to be considered valid qualifying contributions.

Several candidates suggested that the Commission devise a procedure by which qualifying contributions may be given by means of a debit or credit card or over the internet. The proposed change gives the Commission the discretion to establish those procedures by rule. The staff does not see a problem with collecting qualifying contributions in this manner as long as the candidate can produce documentation that the individual did in fact make the contribution.

**21-A M.R.S.A. §1125(4) – Filing with commission**

The proposed change would add the requirement that a candidate must also submit receipt and acknowledgement forms, proof of verification of voter registration, and a completed seed money report during the qualifying period along with the qualifying contributions. Currently, the requirement to submit those documents is only in the Commission's rules. Because they are fundamental to the certification process, the staff believes they should be in the statute.

**21-A M.R.S.A. §1125(5) – Certification of Maine Clean Election Act candidates**

The staff proposes adding a requirement that gubernatorial candidates must raise a minimum of $10,000 in seed money contributions as one of the criteria for certification. As with other proposed changes to the requirements for gubernatorial candidates, this change would require gubernatorial candidates to demonstrate that they have the support of Maine residents and that they have sufficient funds to launch and maintain a statewide effort to collect qualifying contributions. As was evident from the last election, gubernatorial candidates have to raise and spend seed money contributions for this purpose or they will not be successful in obtaining enough valid qualifying contributions. As the Commission is aware, one gubernatorial candidate raised well under $10,000 in seed money, but was found to have used MCEA funds to pay campaign staff for services rendered in the qualifying period. The change merely reflects the reality that gubernatorial candidates must raise and spend funds to collect qualifying contributions and will not be an undue burden on candidates.

The proposed change would expressly provide the Commission's Executive Director with the authority to make decisions regarding certification. This is currently the practice.

The staff proposes lengthening the time period for processing a gubernatorial candidate's request for certification from 3 business days to 5 business days. Even without any of the other proposed changes being implemented, it is necessary for the staff to have sufficient time to review and verify the candidate's submission thoroughly. With the proposed changes requiring additional documentation and a higher number of qualifying contributions, a longer time period is crucial.

The other changes regarding the certification requirements and revocation of certification were presented to the Commission at its November meeting.

**21-A M.R.S.A. §1125(6) – Restrictions on contributions and expenditures for certified candidates**

This proposed change would prohibit candidates from using MCEA funds to make payments to themselves, their immediate family, and affiliated business or non-profit entities, except for the payments of goods or property purchased by the campaign. A candidate would not be able to use MCEA funds to pay for the services provided by the candidate or the candidate's immediate family or affiliated business entities. Immediate family members would have to provide services on a volunteer basis. The change is made in response to issues in past campaigns in which family members received significant amounts of MCEA funds, which the campaign could not satisfactorily justify. The public perception that some candidates funnel public funds to family members is very damaging to the Act. Most candidates will not be affected by this change.

**21-A M.R.S.A. §1125(6-A) – Assisting a person to become an opponent**

This proposed provision was submitted to the Commission for consideration earlier in 2006. It is the result of several situations where there were credible allegations that a MCEA candidate recruited and assisted another person to become a candidate in the same race as the MCEA candidate. The assistance was mostly given by gathering signatures to get on the ballot and to file the necessary paperwork with the Secretary of State and the Ethics Commission. Under current law, these actions would not be a violation of the Act even though they are clearly meant to manipulate the process to get more MCEA funds for a contested election. The proposed change would make those actions a violation of the Act, which could result in the denial, or revocation of certification and monetary penalties.

**21-A M.R.S.A. §1125(8) – Amount of fund distribution**

Under current law, any gubernatorial candidate who meets the April 15th deadline and who qualifies for MCEA funding would be eligible to receive $200,000 as the initial primary distribution amount, regardless of whether the candidate had a primary opponent or, in the case of an unenrolled candidate, was in a primary election at all. The proposed change creates an initial primary distribution amount of $80,000 (40% of the contested amount) for gubernatorial candidates who are unopposed in a primary election or who are unenrolled.

The other change to this subsection is the inclusion of a paragraph that requires unspent seed money contributions to offset the amount of the initial primary distribution amount, except for replacement candidates. This change was referred to earlier with regard to §1124(2)(D).

**21-A M.R.S.A. §1125(10) – Candidate not enrolled in a party**

The change is a rewording of the section on the timing and distribution amounts for certified unenrolled candidates. It does not change the meaning or requirements of the provision but adds more clarity and detail.

**21-A M.R.S.A. §1125(14) – Appeals**

There are three major features to this proposed change. First, it allows the Commission to extend the time period in which it must hold a hearing on an appeal of a certification decision upon the agreement of the parties or for cause. Second, it provides a clearer standard for the appellant's burden. The current law requires the appellant to provide evidence to demonstrate that the Commission's decision was improper. The proposed standard is that the appellant prove that the Commission's decision was in error as a matter of law or was based on factual error. Third, the proposed change brings the Commission's appeal process in compliance with Maine's Administrative Procedures Act and outlines the procedure for appealing the decision of the Superior Court to the Law Court.

One minor change is extending the time period in which the Commission must rule on the appeal from 3 days to 5 business days after the completion of the hearing.